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SCRUTINY ON 'GERRYMANDERING' AND MISUSE OF DELIMITATION POWERS: INDO- US PARALLEL

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RESEARCH METHODOLOGY

Aims and Objectives:

This Research Paper seeks to throw light on the existent political hurdles at the early stage of delimitation of constituencies.

Scope and limitations:

The scope of this paper is primarily limited to the state of affairs regarding ‘gerrymandering’ and delimitation and further about measures taken by the governments of both India and the United States. Nevertheless, it does not delve into the reasoning behind such measures.

Research Questions:

The Authors have attempted to answer the following questions in the course of the paper:

- i) To what extent is ‘gerrymandering’ prevalent in India and the US?
- ii) What are the existent remedial measures to tackle favoured de-limitation?
- iii) What are the blatant differences in approach between the authorities of India and the US while tackling this issue?

Sources of Data:

The Authors have utilised primary sources of data like case laws and legislations as well as secondary sources of data like web resources and articles to prepare for this paper.

Method of Writing:

The Paper is both descriptive and analytical in nature.

Mode of Citation:

The Authors have adopted the Bluebook 19th Edition Citation and have followed it throughout.

ABSTRACT:

The basis of any democratic election system lies on the delimitation of constituencies. Right from the genesis of this concept, there have been instances of altering or twisting of boundary lines to one's advantage. This was ignored and brushed aside for a long period of time until it started hampering with the fair conducting of elections. Recent state practices in creation of new territories and general outrage amongst the public has thrown open the gates for analysing gerrymandering and delimitation of constituencies. The concept has however, had wide-spread attention given by the courts of the United States. This short research paper seeks to address these concepts in a subjective manner. In the first part of the paper we would be dealing with an Indian outlook towards these concepts. In the second part, we will be analysing the position as in the United States. Finally, towards the last part of the paper, we will deal with the comparative analysis between these two countries followed by a series of suggestions from the authors to curtail the issue of gerrymandered constituencies.

Keywords: Gerrymandering, Constituencies, Delimitation Commission, 2001 Census, re-districting, Comparative.

INTRODUCTION:

'Gerrymandering' refers to the practice of manipulating boundaries of political constituencies so as to provide one party with an advantage over another. The practice is notoriously a problem in the United States, where both parties agree it is a problem, but neither is willing to change it.¹ In India, such a problem has not been raised by anyone and that is because the system in India is arguably fairer than the one in the United States. Nevertheless, the same seems to be slowly creeping into our system of administration. This calls for an imminent need to re-look into the existing policy measures available for delimitation of constituencies. Alongside the same, special attention needs to be given to instances where gerrymandering is prevalent, both in India and the US. During the course of this paper, we will be dealing in detail about the concepts of 'delimitation' and 'gerrymandering' in detail. Further, mere pointing out of existing lacuna serves no good for anyone and hence, the authors would like to suggest certain remedial measures to curtail a severe case of gerrymandering from happening in India.

¹Duignan, B. (2019). '*Gerrymandering: Definition, Litigation, & Facts*', [online] Encyclopedia Britannica. Available at: <https://www.britannica.com/topic/gerrymandering> [Accessed on 4 Nov. 2019].

INDIA

1) JURIDICAL SET-UP OF DELIMITATION:

Delimitation literally means the act or process of fixing limits or boundaries of territorial constituencies in a country or a province having a legislative body. The job of delimitation is assigned to a high-power body. Such a body is known as Delimitation Commission or a Boundary Commission. In India, such Delimitation Commissions have been constituted 4 times – in 1952 under the Delimitation Commission Act, 1952, in 1963 under Delimitation Commission Act, 1962, in 1973 under Delimitation Act, 1972 and in 2002 under Delimitation Act, 2002.²

The Delimitation Commission in India is a high-power body whose orders have the force of law and cannot be called in question before any court. These orders come into force on a date to be specified by the President of India in this behalf. The copies of its orders are laid before the House of the People and the State Legislative Assembly concerned, but no modifications are permissible therein by them.³

The concept of delimitation has gained recent nation-wide attention owing to the bifurcation of Jammu and Kashmir state into the Union Territories of J&K and Ladakh. This has made delimitation of their electoral constituencies inevitable.

Delimitation is essentially done for three primary reasons. Firstly, to ensure that the equal segments of a population are provided with equal representation. Secondly, for the fair division of geographical areas, so that one political party doesn't have an advantage over others in an election. Finally, to follow the principle of "One Vote One Value".

The Constitution of India lays down the basic principles that should govern delimitation. Article 81 (2) states:

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and

² <https://eci.gov.in/delimitation-website/delimitation/>

³ *Ibid.*

the number of seats allotted to it is, so far as practicable, the same throughout the State.

Further, *Article 81(1)* also sets a maximum number of MPs to be elected to the Lok Sabha, and states that the population figures should be determined by the national census. These underlying principles have remained unchanged, although a number of Constitutional Amendments have altered the details. The main substantive amendment has been the Forty-Second Amendment, which cancelled the delimitations which should have taken place after the 1981 and 1991 censuses. This meant that provisions for the periodic adjustment of constituency boundaries and the allocation of seats between States according to changes in population were nullified.

Article 82 states that delimitation shall be carried out ‘by such authority and in such manner as Parliament may by law determine’. The lack of Constitutional entrenchment relating to the practice of delimitation has been described as ‘rather odd’ by Ivor Jennings⁴ and stands in contrast to the explicit directions regarding the structure and authority of the Election Commission as elucidated under *Article 324*. Leaving the process of delimitation to the discretion of politicians has opened it to the charge of political manipulation; and the history of delimitation shows a continuing conflict between the desire to present the process as open and fair, and the temptation for politicians to control the process.

To curtail this, **Article 170 was introduced so that the States also get divided into territorial constituencies as per Delimitation Act after every Census. Once the Act is in force the Union government sets up a Delimitation Commission.**

The Delimitation Commission is **appointed by the President** of India and works in **collaboration** with the **Election Commission of India**. It comprises of a Retired Supreme Court judge; the Chief Election Commissioner and; Respective State Election Commissioners.

⁴ Bhalla, R P, ‘*Elections in India (1950–1972)*’, New Delhi: S Chand and Co (q. Bhalla 1973: 45).

The first delimitation was carried out under the office of the President, with the groundwork being done by the Election Commission, whose proposals were then laid before Parliament. The process was seen as unsatisfactory, and the Union Minister of Law, C C Biswas, commented that:

*“The President’s Orders which were laid before the Parliament, were simply torn into pieces by Parliament, whose decisions seems to have been actuated more by the convenience of individual Members of the House rather than by considerations of general interest”*⁵

Whilst the system of election worked much more smoothly than before, the setting up of the Delimitation Commission did not completely remove doubts about the independence of the process. As R P Bhalla notes: *‘It was regarded as a familiar device of giving an unbiased colouring to the biased proposals of the government’*.⁶ The First Delimitation Commission carried out the apportionment of seats for the 1957 elections, taking into account the population figures from the 1951 census. The Second Delimitation Commission was established under the Delimitation Act 1962. The Act increased the number of Associate Members to nine for each State: four from the Lok Sabha and five from Legislative Assembly. The change suggests that MPs wanted to keep a close eye on changes to their own constituencies. The Third Delimitation Commission, and the last one before the 2001 census, was set up under the Delimitation Act 1972. The basic structure of a three-member Commission with two judicial members and the Chairman of the Election Commission was retained, although the number of Associate members for each State was increased to ten (five MPs and five MLAs), appointed by the Speaker of the Lok Sabha or Vidhan Sabha.

The Delimitation Commission has three major functions:

- i) To determine the number and boundaries of constituencies to make population of all constituencies nearly equal.
- ii) **To identify seats reserved for Scheduled Castes and Scheduled Tribes**, wherever their population is relatively large.
- iii) In case of difference of opinion among members of the Commission, **the opinion of the majority prevails.**

⁵ Jha, Nagesh *‘Delimitation of Constituencies: A Plea for some Effective Criteria’*, Indian Journal of Political Science 24: 129–147 (1963).

⁶ Bhalla 1973: 61.

Three aspects of the institutional structure of the Delimitation process merit discussion: the need for Constitutional entrenchment, the need for political Associate members, and the role of the Election Commission. The provisions of *Article 82* are clearly inadequate, and should be redrafted to ensure the Constitutional entrenchment of the delimitation procedure. This would remove the necessity for Parliament to legislate for a Delimitation Commission after every census and insulate the Commission from charges of political manipulation. Given that there is already a recognition of the special status of the delimitation process, through *Article 329* which makes decisions of the Commission non-justiciable, such a reform would be in line with the existing tenor of the Constitution.

India began redrawing electoral constituencies based on the 2001 census.⁷ Since this was the first redrawing of electoral boundaries in three decades, this resulted in widespread changes to the electoral boundaries. Rural-urban migration has resulted in much faster growth of urban population compared to rural population; the redistricting exercise therefore resulted in a greater allocation of electoral seats to urban areas. For instance, in the state of Andhra Pradesh, Hyderabad city and its surrounding areas were represented by 19 seats until 2008, but will be represented by 29 legislators from 2009 onwards.⁸ The redistricting exercise in India was carried out by an independent (non-political) three-member Delimitation Commission, comprised of a former Supreme Court judge, the Chief Election Commissioner of India and the State Election Commissioner of the state concerned.⁹

The goal of the Delimitation Commission was to redraw constituencies such that “the population of each parliamentary and assembly constituency in a State shall, so far as practicable, be the same throughout the State.”¹⁰ This was subject to the constraints that the constituencies be geographically compact and contiguous, every state assembly constituency should lie wholly within a national parliamentary constituency, and all assembly constituencies should lie wholly within administrative districts.¹¹

The presence on the Delimitation Commission of Associate members from the Lok Sabha and Vidhan Sabhas is too easily construed as political interference. This is where the Election Commission has played a key role in supporting the work of Delimitation Commissions, and

⁷ Delimitation Act, 2002.

⁸ Districts of Hyderabad and Rangareddy.

⁹ Lakshmi Iyer, Maya Reddy, ‘*Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World’s Largest Democracy?*’, Harvard Business School (2013).

¹⁰ *Ibid*; Delimitation Commission of India, 2004.

¹¹ *Ibid*.

has the expertise and resources necessary for the effective application of delimitation. As such, the Election Commission's role as the organizational force behind delimitation should be recognized in law.

Whether the Election Commission takes over the whole process of delimitation is still in debate and our stance regarding the same is by placing reliance on the Australian Commission's framework:

“the legal provisions governing redistribution are precisely drafted, are detailed, and give relatively little scope for discretion in their implementation ... Particular outcomes can be seen to be the product of application of enduring principles rather than less well-defined ad hoc considerations.”¹²

2) **INSTANCES OF GERRYMANDERING:**

As already stated, the concept of Gerrymandering is mostly prevalent in the USA. Nevertheless, recent times have witness a new sprung in growth of interest in the Indian Peninsular as well. Based on statistical data,¹³ for non-incumbents, their performance in the previous election was the major factor in deciding whether they would run again. Previous studies have documented a significant degree of anti-incumbency bias in Indian elections. We do not find any significant associations between the extent of redistricting and the probability of an incumbent politician or party getting re-elected. We examined some indicators of political competition, such as the number of candidates running for each seat and the average vote share margin of the winning candidate. We find that fewer candidates enter the race when the constituency becomes reserved for Scheduled Castes, and incumbent parties are more likely to retain control of these seats, possibly because they are able to field alternate candidates belonging to the right social group and benefit from the reduced competition.¹⁴

A singular example for the same can be the Puducherry Assembly Elections 2016. It was alleged that there occurred a case of ‘Gerrymandering’ to keep the Dalits away. While Scheduled

¹² Maley, Michael, Trevor Morling, and Robin Bell, ‘Alternative ways of redistricting with single-member seats: the case of Australia’, McLean and Butler (eds) Fixing the Boundaries 119– 145 (1996).

¹³ Barooah, Vani, ‘Incumbency and Parliamentary Elections in India’, Economic & Political Weekly 41 (8): 739-746 (2006).

¹⁴ Lakshmi Iyer, Maya Reddy, ‘Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World's Largest Democracy?’, Harvard Business School (2013).

Caste migrants — who moved into **Puducherry** after 1964 — have been denied reservation and the status of being a native, thereby stemming their in-bound migration, members of other communities can benefit from State schemes and reservation after staying here for five years. This has led to an alleged virtual stagnation in the SC population while groups such as Vanniyars continued to swell in numbers.¹⁵

The delimitation of constituencies, which was based on the 2001 census, has not empowered the Dalits to elect a representative who can voice their concerns in the Assembly. In clear violation of the Delimitation Act, 2002, all the four reserved constituencies in Puducherry are in rural areas, with urban Puducherry remaining exclusionist.¹⁶

Section 9(1)(c) of the Act says that “constituencies in which seats are reserved for the Scheduled Castes shall be distributed in different parts of the State and located, as far as practicable, in those areas where the proportion of their population to the total is comparatively large”.

Thus, it cannot be bluntly assumed that Gerrymandering is not present in India. One needs to look at the concept subjectively and thereby we can find the practise prevalent in other forms.

THE UNITED STATES:

1) BACKGROUND OF GERRYMANDERING IN THE US:

Delimitation, also known as ‘re-districting’ is one of the most well-founded system in the States. The process of redistricting was politicized in America as early as 1740. Until the landmark US Supreme Court decision *Baker v. Carr*¹⁷ in 1962, the major legal constraint on gerrymandering was that districts be contiguous.¹⁸

Many states, particularly in the South, had not redrawn Congressional districts after each decennial Census. Since population growth was much greater in urban areas, this inertia served

¹⁵Senthalir, ‘Gerrymandering’ to keep Dalits away’, <https://www.thehindu.com/elections/puducherry2016/gerrymandering-to-keep-dalits-away/article8591579.ece> [Accessed on 30th October 2019].

¹⁶ *Ibid.*

¹⁷ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁸ Friedman, John and Richard Holden, ‘Optimal Gerrymandering: Sometimes Pack but Never Crack’, *American Economics Review* 98:113-144 (2008).

to dilute the urban vote—often poor and black—and enhance the political power of rural white voters who traditionally supported the Democratic Party.¹⁹

The matter was further considered in several pronouncements. For instance, the Court in *Wesberry v. Sanders*²⁰ has declared that if a state is provenly unable to draw district boundaries, then the federal district courts are vested with the power to do the same. Reliance can also be placed on the judgement in *Karcher v. Daggett*²¹ wherein a New Jersey redistricting plan was overturned when it was found to be unconstitutional by violating the constitutional principle of one person, one vote, whilst rejecting the State claim of trying to preserve minority voting power. However, Friedman and Holden (2009) find that partisan gerrymandering is not a significant determinant of the increasing re-election probability of US politicians.²²

2) **OBJECTIONS TO GERRYMANDERING:**

A basic objection to gerrymandering of any kind is that it tends to violate two tenets of electoral apportionment—compactness and equality of size of constituencies.²³ In 1963, in *Gray v. Sanders*,²⁴ the Court first articulated the principle of “one person, one vote” in striking down Georgia’s county-based system for counting votes in Democratic primary elections for the office of U.S. senator. One year later, in *Wesberry v. Sanders*,²⁵ the Court declared that congressional electoral districts must be drawn in such a way that, “as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s.” Subsequently in the same year, the Court affirmed, in *Reynolds v. Sims*,²⁶ that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”

The Arizona State Legislature challenged the constitutionality of a non-partisan commission, rather than the legislature, for redistricting. In *Arizona State Legislature v. Arizona*

¹⁹ *Ibid.*

²⁰ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²¹ *Karcher v. Daggett*, 462 U.S. 725 (1983).

²² Friedman, John and Richard Holden, ‘*The Rising Incumbent Advantage: What’s Gerrymandering Got To Do With It?*’, *Journal of Politics* 71(2): 593-611 (2009).

²³ Brian Duignan, ‘*Gerrymandering*’ (2019), <https://www.britannica.com/topic/gerrymandering> [Accessed on 31st October 2019].

²⁴ *Gray v. Sanders*, 372 U.S. 368 (1963).

²⁵ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁶ *Reynolds v. Sims*, 377 U.S. 533 . (1964).

Independent Redistricting Commission (2015), the US Supreme Court upheld the constitutionality of non-partisan commissions.²⁷

When it comes to the case of gerrymandering based on race, the US Supreme Court has held in *Thornburg v. Gingles*,²⁸ that such practices are incompatible with Section 2 of the 1965 Voting Rights Act (as amended in 1982), which generally prohibits voting standards or practices whose practical effect is that members of racial minority groups “*have less opportunity than other members of the electorate to...elect representatives of their choice.*”

Further, in *Shaw v. Reno*,²⁹ the US Court ruled that electoral districts whose boundaries cannot be explained except on the basis of race can be challenged as potential violations of the equal protection clause, and in *Miller v. Johnson*³⁰ it held that the equal protection clause also prohibits the use of race as the “predominant factor” in drawing electoral-district boundaries.³¹

The US Supreme Court once again took up the issue of the justiciability of political gerrymandering claims in *Rucho v. Common Cause*.³² There the Court’s conservative majority, over the bitter objections of its more liberal members, declared (5–4) that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.” Chief Justice John Roberts wrote in a 5-4 opinion for the majority. The ruling split evenly along ideological lines, with the court’s four liberal-leaning justices dissenting. State-level courts would still be able to hear partisan gerrymandering cases, but the Supreme Court’s demurral meant that no federal standard to block the practice was likely soon.³³

Michael Waldman, the president of the Brennan Center for Justice, said:

*“Chief Justice Roberts’ ruling that no federal court can ever consider claims of extreme and unconstitutional partisan gerrymandering is truly appalling for the long-term health of our democracy. It’s a judicial green light for egregious partisanship, a permission slip for politicians to entrench themselves without fear of judicial intervention.”*³⁴

²⁷ *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ___, June 2015

²⁸ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

²⁹ *Shaw v. Reno*, 509 U.S. 630 (1993).

³⁰ *Miller v. Johnson*, 515 U.S. 900 (1995).

³¹ Brian Duignan, ‘Gerrymandering’ (2019), <https://www.britannica.com/topic/gerrymandering> [Accessed on 31st October 2019].

³² *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

³³ <https://www.theguardian.com/law/2019/jun/27/supreme-court-gerrymandering-ruling-verdict-constitution-districting> [Accessed on 20th October 2019].

³⁴ *Ibid*

COMPARATIVE SUMMARY BETWEEN THE SCENARIOS OF INDIA AND UNITED STATES:

The Delimitation Commission is a body that the Constitution authorises the Parliament to set up in order to draw the constituencies. The last Delimitation Commission was set up via the Delimitation Act, 2002. The commission was authorised to redraw the boundaries of all state legislative constituencies and Lok Sabha constituencies. While the 84th Constitutional Amendment had frozen the seats in each state for the Lok Sabha and state legislative assemblies, they had to be redrawn to account for the demographic changes in the regions. This was, in essence, the task of the commission. It was to bring about a judicious balance of voters within every constituency in a state. The most important aspect here is that the creation of these constituencies is by an apolitical body, whose main members are drawn from the Indian Judiciary and the bureaucracy. It is possible that they have biases that may have influenced their decisions. But the commission's process was so long drawn out, with multiple public sittings that it would be impossible for such a bias not to be apparent.

The Delimitation Act, 2002, under *Section 9*, states that the delimitation commission is required to include the maximum amount of population of Scheduled Castes or Tribes within that constituency. Which is why for example, Mavelikkara constituency in Kerala looks like a long line. Nabarangpur constituency in Orissa has a weird shape for this very same reason. The commission drew the boundaries using the existing administrative boundaries within the state to create legislative and Lok Sabha constituencies. The Delimitation Act, 2002, had mandated that the commission draw these constituencies as far as possible to be geographically compact. The Act mandated that every assembly constituency ought to fall within a single parliamentary constituency. Further, as per the methodology for delimitation evolved by the commission, each assembly constituency ought to fall within one district. Therefore, a constituency was allocated as per districts. These assembly constituencies were then allocated into Lok Sabha constituencies.³⁵

This is in contrast to the intensely political process that the United States has, which involves, in many cases, the state legislatures deciding the boundaries. Such a situation does not exist in India. In the United States, gerrymandering has led to non-competitive races in most

³⁵Shashidhar, K., 'Forbes India Investigation: India's most gerrymandered constituencies' Forbes India [online] Available at: <http://www.forbesindia.com/article/special/forbes-india-investigation-indias-most-gerrymandered-constituencies/53011/1> [Accessed on 4th November 2019].

congressional districts. On the other hand, in India, 90 per cent of constituencies experience fierce competition. This itself is enough proof that our constituencies are not gerrymandered. The boundaries of every constituency may not make eminent sense but within the constraints that the commission had, there can be no doubt that they did the best job they could. In any case, these constituencies are only geographically skewed, not politically skewed.

The method of loop hole in delimiting or redistricting the constituencies was first done by the governor of Massachusetts, “Elbridge Gerry”. In 1812, he delimited an electoral district like “Elongated and Squiggly shape” which resembled the Salamander. His family name of Gerry was merged with a noun salamander to create the term Gerrymandering. The technique of Gerrymandering is that in redistricting the state or city, spread the majority of the party all over, has many districts as possible and if there is enough votes to control every district, concentrate the strength of the opponents in few district as possible so that it will do them the least good.

In the USA, Gerrymandering was connected with history. In order to send its representative to the US house of representative in each state, political parties in the legislature used Gerrymandering to control in its favour, as a result there was disagreement among them and typically need to be redrawn. Further, after the passage of the Voting Right Act of 1965, when the state legislature could not agree on boundaries Federal Courts ensured for not continuing historical patterns of discrimination. Further, it also paved way for defining new districts. Later, the US Supreme Court, in 1985, struck down the practice of political Gerrymandering. Further, in 1993 and 1995, it struck down even racial Gerrymandering under which electoral districts were created with the majority of minorities so that underrepresented minorities got a chance to elect their representative. Standing committees have been created for districting after 2010 census in states of Washington, Arizona and California to curtail political influence.³⁶

³⁶ Nytimes.com, *What Is Gerrymandering? And Why Did the Supreme Court Rule on It*, [online] Available at: <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html> [Accessed on 1st November 2019].

SUGGESTIONS FOR THE INDIAN SET-UP:

- i) The best way of depoliticising the delimitation process is to provide strict procedures and guidelines which make the process an administrative mechanism which is not liable to political manipulation.
- ii) Regarding the distribution of seats within States, limits should be placed on the amount constituency populations should be allowed to deviate from the State average, and a proposal that such deviation should not exceed ten per cent was suggested.
- iii) The practice of carrying out delimitation after each census should be reintroduced, and it should be recognised that the postponement of change in the representative structure of India merely stores up problems for the future.
- iv) A **national consensus** exercise should be started to sort out issues much before 2026, keeping in mind that the freeze on Lok Sabha seats have been extended until the 2026 general elections.

CONCLUSION:

Thus, in order to prevent politicians manipulating the delimitation process for their own self-interest guidelines have to be established which entrench procedural and methodological aspects, thus limiting the scope for partisan interference. The United States seems to have a rather well-defined system of addressing the issues of gerrymandering as opposed to its Indian counterpart. Although, the majority opinion in the *Rucho* case comes as somewhat as a shock, it seems like the States has other alternate measures set up to try and curtail gerrymandering in theory. The practicality however seems to be completely the contrary whereby they have become infamous for having the most biased de-limited constituencies.

In the Indian scenario, **499** out of total 543 Parliamentary constituencies were **newly delimited constituencies in the 2009 general elections**. This coupled with the recent delimitation of Jammu & Kashmir and Ladakh constituencies has only added uncertainty to the neutrality of the delimitation process. Whether the same will be channelized well by the Central Government or be

adding fuel to an already rising fire called ‘gerrymandering’ can only be answered as we progress with time.